Supreme Court, U.S.
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NO. 91-1814

SUPREME COURT OF THE UNITED STATES

October Term, 1991

RAYMOND COMER
and MARION CORN — PETITIONERS

V.

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS — RESPONDENT

ON PETITION FOR WRIT OF
CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

REPLY TO BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES

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Cases:

324 Liquor Corp. v. Duffy,
479 U.S. 335, 351 (1987) 4

MAY IT PLEASE THE COURT:

We reply here only to the Arguments made in Respondent's Brief, and in the order thereof.

I

THIS COURT HAS JURISDICTION.

The gravamen of the Commonwealth's argument [page 5] is as follows:

> [In] the Motion for Discretionary Review, the only use of the phrase "due process of law," was an attempt to convince the court that a failure to follow the existing Kentucky law would result in a denial of "due process." This is the first time that the Petitioners have insisted that any court should rule on this or any other federal question.

On the contrary, and as we noted on page 14 of our Brief, this point was raised in the Petitioners' Complaint -- the first document in this record:

> 11. Commonwealth's action in constructing the underpass with the results described herein constitutes

> (a) an unauthorized taking, destruction, or injury to the property of Plaintiffs without just compensation; (b) a deprivation of Plaintiffs' right of reasonable access to the highway system without just compensation; and (c) a taking by eminent domain, all causing damage to Plaintiffs and being in violation of Plaintiffs' due process right.

Also contrary to the Commonwealth's Brief, the same point was persistently argued at <u>every</u> level at which the Petitioners' lost -- including the First Panel of the Court of Appeals of Kentucky:

> The Property Owners also alleged the "taking" violated their constitutional due process rights (Paragraph 11). The Property Owners' due process rights were violated since the Fourteenth Amendment to the U. S. Constitution makes clear that no state shall "deprive any person of . . . property, without due process of the law . . ." The Property Owners have been deprived of their property (i.e., their right

> of reasonable access) without any process of law much less their due process. [No page assigned in Record.]

It is true, of course, that Kentucky cases were cited in the state court system, because Kentucky had a consistent tradition which was consonant with the due process clauses of the federal Constitution, and there were no cases in this Court -- which is exactly the point of this appeal. In fact, there is no "due process" clause in the Kentucky Constitution.

Finally, although KRS 418.075 could hardly limit the jurisdiction of this Court, that statute is plainly inapplicable. It applies only to a "proceeding which involves the validity of a statute . . . and if the ordinance or franchise is alleged to be unconstitutional." Furthermore, the Commonwealth has undoubtedly forgotten that

the Complaint was served on the Kentucky Attorney General. [Record, page 9]

II.

THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW.

We can't really tell what the Commonwealth is arguing here. For the most part, the Commonwealth seems to want this Court to make its own finding of fact, which is obviously inappropriate. See 324 Liquor Corp. v. Duffy, 479 U.S. 335, 351 (1987). At other times, the Commonwealth suggests that "a quick review of the trial court's comments" will suggest that the trial court was confused. In fact, a careful review of the trial court's comments (attached to our Brief) shows that the trial court understood the First Panel very well, and made the only possible factual determination, despite his

disagreement with the law declared by the First Panel.

In short, the trial court here made a finding of fact, based upon expert testimony and his own judicial knowledge. That is why this case is so ripe: a finder of fact has already applied the standard which this Court should hold to be appropriate.

III

THIS CASE DOES INVOLVE AN IMPORTANT DECISION IN CONFLICT WITH FIRST ENGLISH EVANGELICAL CHURCH.

The gist of the Commonwealth's argument here is that after First English Evangelical Church various courts have taken various conflicting positions on the law which is the subject matter of this case. We agree; that is why we cited the Nichols treatise. There are cases out there where "taking" requires physical possession, where "total" destruction of

value is required. Some states (and on occasion their courts) have indeed twisted and turned in the wind to protect their treasuries.

We could not have made our point more succinctly than the Commonwealth does on page 16 of its Brief:

> What we have learned since First English is that there is not a clear view as to what constitutes a "taking" under the Fifth and Fourteenth Amendments to the United States Constitution.

Exactly.

We respectfully urge this Court to take this opportunity to declare that the imposition of "mere circuity" does demand compensation under the Constitution of the United States when "reasonable access" is not retained. This Court will never have a better case for doing so, nor a case where so grave an injustice has been done.

IV

A DECISION ABOUT "THE LAW OF THE CASE" IS AVAILABLE TO THIS COURT

Since we had fully described the current status of "the law of the case" doctrine as it applies to "issue preclusion" and the Constitution, the Commonwealth is relegated to an inaccurate statement [on page 19] of the facts of this case:

> The First Panel did not affirm law on the taking issue as Petitioners suggest. [Emphasis in the original]

On the contrary, the First Panel correctly declared the law of this case, in accordance with prior Kentucky cases and First English Evangelical Church. We suggest once again that this is an appropriate case for this Court to declare the result of that fact.

Respectfully submitted,

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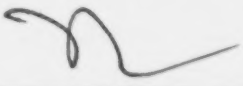
By 
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